No. 12,527

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 16,
Appellants,

vs.

JUNEAU SPRUCE CORPORATION (a corporation),
Appellee.

APPELLANTS' REPLY BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Constitutions

Statutes

Texts

Miscellaneous

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APPELLANTS' REPLY BRIEF.

I.

THE ISSUE OF WHO IS ENTITLED TO THE WORK MUST BE DECIDED BY THE BOARD BEFORE CONDUCT BECOMES ACTIONABLE UNDER SECTION 303(a)(4).

Before examining in detail the arguments advanced by appellee concerning the meaning of Section 303(a)(4) of the Act, it is our belief that it would be helpful to summarize briefly our position in that regard. Such a summary will help remove the confusion engendered by appellee's misconceptions of our arguments, and will make more evident the basic differences of the parties concerning the meaning of the law applicable to this case.

Appellants clearly demonstrated in their Opening Brief that a determination of the jurisdictional dispute (or an "arbitration" thereof, to use the language of appellee) by the Board under Section 10(k) was a condition precedent to an action for damages under Section 303(a)(4) of the Act. Such an arbitration by the Board, it was shown, is a jurisdictional prerequisite to an action under Section 303(a)(4) not because it would be "awkward" to have both the Board and a court hearing the facts concerning the same dispute at the same time, but because the acts proscribed by Section 303(a)(4) become illegal under that Section and hence actionable *only* when persisted in after an adverse Board determination under Section 10(k). Appellants proved that the defined primary concerted activities of labor organizations do not become unfair labor practices under Section 8(b)(4)(D) or illegal under Section 303(a)(4) until an adverse Board award of the disputed work is made.

This result followed from the differing Congressional treatment under the Act of jurisdictional disputes on the one hand, and secondary boycotts on the other. Congress determined to deal with the problem of secondary boycotts by making the ban on them complete, irrespective of the merits of the dispute giving rise to them.[1] Accordingly, no procedure was included in the Labor Relations Act under which the

[1]Thus, for example, the argument of Senator Murray that certain secondary boycotts were justifiable (Legislative History, p. 1455) was rejected in favor of the view of Senator Taft that all secondary boycotts were unjustified and should be prohibited. (Legislative History, p. 1106.)

Board was given authority to settle the dispute out of which a secondary boycott arose, and labor unions engaging in them were made subject unqualifiedly to unfair labor practice proceedings, and to actions for damages.

Congress reached a different result with respect to jurisdictional disputes. As was pointed out in our Opening Brief (pp. 43-47), the Senate view that the problem of obstructions to interstate commerce arising out of jurisdictional disputes could best be met by giving the Board authority to arbitrate such disputes on their merits, in order to finally settle them, prevailed over the sweeping position of the House that all activities of labor organizations arising out of jurisdictional disputes should be outlawed without regard to their equitable settlement. The Act as finally passed was thus tailored to meet the Senate's objectives. The parties to the dispute were given, in the first instance, authority to settle the dispute among themselves. Failing such a settlement, the Board was given authority to arbitrate the dispute, and to make an award determining which of the contending labor organizations was entitled to have the employees it represented perform the work in question.[2] This award of the Board was not made directly enforcible by petition to the Court of Appeals, as was the case with other orders of the Board. Instead, adherence to it was encouraged by providing certain

[2]Despite the implication to the contrary in the statement in Appellee's Brief, p. 14, that a labor union *may* submit to a hearing of the Board, the Board's hearing under Section 10(k) is mandatory, and proceeds without the necessity of obtaining the consent of the parties. *Moore Drydock Co.*, 81 NLRB 1108 (1949).

penalties or disabilities for non-compliance. Thus, if a contending labor organization against whom the Board's award had been adverse persisted in seeking the work by picketing the employer after the Board had ruled against it, it subjected itself to a cease and desist order under Section 8(b)(4)(D) and became liable under Section 303(a)(4) for any damages caused by picketing carried on after the award had been made. On the other hand, if the employer refused to abide by the Board's award, the union could seek to enforce it by primary economic action against him, secure from both a proceeding under Section 8(b)(4)(D) and an action for damages under Section 303(a)(4).

Our Opening Brief proved clearly that this view of the meaning of Sections 10(k), 8(b)(4)(D) and 303(a)(4) was the only one consistent with the congressional purpose with respect to jurisdictional disputes, as revealed by the legislative history. It indicated, in addition, that this view of the meaning and purpose of Section 10(k) had been accepted by the Board itself, in its decisions under the Labor Relations Act. (Opening Brief, pp. 37-43.) It was for these reasons that the judgment of the court below, based as it was on a disregard of the significance of the Board's authority under Section 10(k), was shown to be erroneous.

The appellee's attempt to answer these arguments, stripped to its essentials, relies on the proposition that appellants, as well as the Board itself, are misconstruing the provisions of Section 10(k) of the Act.

As will become evident, appellee's position must stand or fall on whether its view of the meaning of Section 10(k) is correct, for it advances no basic disagreement with, or attempted refutation of, the other propositions upon which appellants rely. Thus, while appellee states that whether or not conduct is an unfair labor practice under Section 8(b)(4)(D) of the Labor Relations Act is wholly immaterial to the consideration of whether such conduct is unlawful under Section 303(a)(4), and thus implies that the two sections are addressed to different conduct (Appellee's Brief, p. 18), it concedes that the damage action under Section 303(a)(4) lies for jurisdictional strikes "as defined in the Wagner Act" (Appellee's Brief, p. 12), i.e., in Section 8(b)(4)(D).[3] Nor does it answer the proof from the legislative history of the Act (Opening Brief, p. 37) that only conduct made unfair by Section 8(b)(4)(D) is actionable under Section 303(a)(4). Furthermore, appellee concedes that if the Board has authority under Section 10(k) to arbitrate a jurisdictional dispute, "there would have been not only logic, but necessity [for Congress to add] as a condi-

[3]This relationship between Title I and Title III of the Act, together with the "Declaration of Policy" which precedes and is applicable to all five titles of the Act, is the brief answer to appellee's implication that the various titles of the Act are not to be construed together. (Appellee's Brief, p. 11.) As we point out below, pp. 29-30, appellee itself rejects this obviously untenable position in its argument on the status of the trial court.

In that connection, it is beyond our comprehension how appellee can say in one breath that unions may be sued under Section 303 for engaging in jurisdictional strikes "as defined in the Wagner Act" [i.e., Title I of the Act], and then, at a later point in its brief, blandly declare that "* * * a suit for damages under Section 303 is not in any way affected or controlled by the substantive or procedural aspects of Title I of the Act". (Appellee's Brief, p. 93.)

tion precedent to Section 303(b) that the Board first arbitrate the issues." (Appellee's Brief, p. 22.)[4] Appellee thus recognizes that, granted the Board's authority to arbitrate, a violation of Section 303(a)(4) giving rise to damages will arise not simply by the commission of the acts enumerated, but by their commission *after* the Board's award has been made and in disregard of it.

We turn then to appellee's position concerning the meaning of Section 10(k) of the Labor Relations Act, and the Board's function thereunder. As far as can be determined from Appellee's Brief, it is as follows: The Board's duty under Section 10(k) "is not to *decide between union claims,* which may be on certification, interunion work-defining agreements, traditional jurisdiction, *et cetera,* for which a skilled arbitrator would be needed. Instead, the questions for decisions are simply (1) To whom had the employer assigned the work in issue? and (2) Is that assignment of work in contravention of a certification of the National Labor Relations Board under Section 9(c) of the National Labor Relations Act?" (Appellee's Brief, p. 21.) If the Board's answer to the second question is in the negative, according to appellee, the Board *must* find that the organization to whom the employer has assigned the work is entitled to it. The Board, says appellee, has no discretionary authority whatsoever under Section 10(k), and the inquiry it makes under the section is a mere formality.

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[4]That Congress did so, although in poorly drawn language, is shown in our discussion below, p. 15.

In fact, it is contended, the inquiry which it can make under Section 10(k) is limited to and identical with that which it must make in determining whether Section 8(b)(4)(D) has been violated. Hence, Section 10(k) not only fails to give the Board authority to arbitrate a jurisdictional dispute on the merits, but is in effect superfluous, since it adds no authority to that given the Board under Section 8(b)(4)(D). Under this view of Section 10(k), appellee argues that, absent a pre-existing certification of the Board under Section 9(c), the issue of who is entitled to the work never arises in a hearing under Section 10(k), in an unfair labor practice proceeding under Section 8(b)(4)(D), and in an action for damages under Section 303(a)(4).

To support this view of the meaning of Section 10(k), appellee relies on the process of amendment to which Section 8(b)(4)(D) was subjected before it emerged in final form. According to appellee, these amendments somehow changed the intention of Congress that jurisdictional disputes should be arbitrated on their merits, and substituted for such intention the view that once an employer had assigned work to employees represented by a particular labor organization, that assignment was just and proper. Appellee thus argues, in effect, that even though the language of Section 10(k) as passed clearly supports the authority of the Board to arbitrate a jurisdictional dispute, its language must be ignored because of the amendments made to Section 8(b)(4)(D) during its progress through Congress.

The argument of appellee cannot be accepted for many reasons. In the first place, it asks this Court to ignore the plain language of Section 10(k), in violation of the elementary rule that a statute should be construed so that effect is given to all its provisions.[5] In this case, the interpretation sought by appellee is so strained as to require that the provisions of Section 10(k) be ignored entirely! Secondly, appellee's position concerning Section 10(k), and the Congressional intent regarding jurisdictional disputes, is untenable in the light of portions of the legislative history not referred to in its brief. Thus, the authoritative explanation of the meaning of Section 10(k) in the bill as passed given by the managers of the conference on the part of the House[6] clearly demonstrates the intention of Congress to give the Board authority under Section 10(k) to arbitrate jurisdictional disputes, and to determine which labor organization has jurisdiction of the disputed work. In addition, the remarks of Senator Morse, made during the Senate debate on the Conference Bill in the form in which it finally became law, make it clear that Section 10(k) as finally passed was intended by Congress to give the Board full discretionary authority to arbitrate juris-

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[5]*Sutherland, Statutory Construction,* 3rd Ed. (Horack), Vol. 2, Section 4705.

[6]House Conference Report No. 510 on H. R. 3020, page 57, remarks printed in full in Opening Brief, pp. 46-47.

dictional disputes.[7] The fact that the Senator, whose own bill S. 858 was the genesis of Sections 8(b)(4)(D) and 10(k), recognized that the bill as passed gave the Board the same authority to settle jurisdictional disputes as would have been exercised by an arbitrator under his bill, and that his views were not disputed by any other senator, again refutes the appellee's contention. These two excerpts from the legislative history demonstrate that after Section 8(b)(4)(D) had been amended *into its final form,* both

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[7]Senator Morse stated:

"In this connection we must examine, too, the provisions of the bill requiring the Board to determine:

* * * * * * *

"Second. What are proper work-task allocations as between unions involved in jurisdictional strikes.

"The Board must perform both of these tasks without the assistance of economic analysts, for under section 4 (a) of the bill it is forbidden to hire such employees. This is much like requiring the Veterans' Administration to provide hospital and medical care for veterans but forbidding them to employ doctors and nurses.

"I am especially disturbed about the amendment made in conference which requires the Board itself, rather than an arbitrator, to decide these jurisdictional disputes. I think the provision is completely unworkable. Under this provision the Board will have to hear and decide the merits of the disputes in the motion-picture industry and the controversy of over 50 years' standing between the teamsters and brewery workers unions, to mention only a few.

"The provision in the Senate bill authorizing the Board to appoint an arbitrator to settle jurisdictional disputes over work assignments was taken from the bill I introduced, S. 858.

"One of the major reasons for suggesting that an arbitrator, rather than the Board itself, handle these problems was that time is of the essence and the regular procedure of the Board is not an effective remedy for these cases. I certainly agree that jurisdictional disputes must be settled, but I am satisfied that the procedure now set up in the bill is not an effective solution." (Legislative History, p. 1554.)

houses of Congress fully intended to give the Board authority to arbitrate under Section 10(k).

In the third place, appellee cannot deny that the Board itself, whose interpretation of the Act is entitled to great respect (see note 14, Opening Brief, p. 43), has rejected its position concerning the meaning of Section 10(k). It did so not only by its direct ruling in the case of *Juneau Spruce Corporation,* 82 NLRB 650 (1949),[8] but by its decisions in all subsequent cases. Thus, despite appellee's assertion to the contrary, the Board *did* make a determination in the case of *Winslow Bros. and Smith Co.,* 90 NLRB No. 188 (1950) of the labor organization which was entitled to the work in question. There, the disputed work had already been assigned by the employer to an employee represented by the Teamsters Union. Despite this fact, and the absence of a pre-existing 9(c) certification on behalf of either the Teamsters or the Fur and Leather Workers Union, the Board held that the work should be re-assigned to an employee represented by the Fur and Leather Workers Union. The case offers an excellent illustration of the frustration of Congressional purpose which would result if appellee's views concerning the meaning of Section 10(k) were adopted. For, under appellee's reasoning, the mere fact that the work had been already assigned by the employer in that case would constitute a determination of who was properly entitled to the work. If the Board had conceived its

[8]See Opening Brief, pp. 39-42.

inquiry under Section 10(k) to be that claimed by appellee, it would have been compelled to find that the employees represented by the Teamsters were entitled to perform the disputed work task, irrespective of whether such a result would have encouraged harmonious labor-management relations. By its decision, the Board recognized the Congressional intention that the power of employers to assign work to whomever they pleased should yield to the judgment of the Board, based as it was on the interests of all the parties and the public, and not merely on that of the employer.

The appellee fails to see that by its treatment of jurisdictional disputes, Congress intended to limit what appellee still insists is the employer's plenary right to assign work. Such a restriction of employer authority undoubtedly is unpalatable to some employers. It may be said that such a restriction is no more palatable to some employers than was the restriction contained in the original Section 7 of the Wagner Act on the employers' therefore unlimited power to hire and fire. In each instance, however, Congress has exercised its judgment that the restriction of employer power in question is justified by the power of Congress to regulate labor-management relations in the public interest.[9]

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[9]Appellee's misconception of Section 10(k) also leads it to make completely unjustified assertions in the portions of its brief dealing with the trial court's refusal to instruct the jury concerning the policies of the Act. (Appellee's Brief, pp. 86-90.)

Appellee claims that had it acceded to the request of Local M-271, I.W.A., to assign the barge-loading work to longshoremen represented by Local 16, it would not only have been violating its agree-

All of the foregoing effectively refutes appellee's views with respect to Section 10(k). More than that, it demonstrates the error in appellee's position that the question of who is entitled to the work is never an issue in an action under Section 303(a)(4). For, as we pointed out in our opening brief, and as appellee has in effect conceded, if that question is one that must be decided by the Board before proceedings under Section 8(b)(4)(D) can be instituted, it is equally necessary that it be determined before conduct can become actionable under Section 303(a)(4).

This analysis of the appellee's position makes unnecessary any extended consideration of the discussion in its brief of the doctrine of primary jurisdiction. That doctrine, as a reading of our Opening Brief will demonstrate (pp. 52-53), was not relied on to

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ment with Local M-271, but would have been violating the law as well. Appellee thus makes the startling assertion that it would have been violating the Act had it settled the entire dispute here in a manner specifically provided for in the Act. The very terms of Section 10(k) contemplate the voluntary adjustment of jurisdictional disputes by the parties themselves.

Furthermore, appellee admitted that when Local M-271 asked it to assign the work to the longshoremen, in accordance with the agreement between the two Locals, Local M-271 was asking that its agreement with appellee be modified to that extent. (T. R. 309.) We know of no principle of contract law, nor does appellee point one out, which would subject one contracting party to an action for breach of contract for assenting to the modification of a contract at the request of the other party.

Finally, by assigning the barge-loading work to the longshoremen at the request of Local M-271, the appellee would no more have violated Section 8(a)(3) of the Labor Relations Act than it did when it deprived the longshoremen in October, 1947, of work they had been doing for appellee to that time. (T.R. 216-218, 232.) In neither instance could it be demonstrated that the assignment was motivated by the union affiliation or lack of affiliation of the workers involved, which is essential to a violation of Section 8(a)(3).

prove that a determination of who is entitled to the work in question was an issue in an action under Section 303(a)(4). On the assumption that appellee might agree that it was an issue in such an action, the doctrine was discussed to prove that only the Board, and not the court or jury, was entitled to make such a determination. In short, the doctrine was discussed to refute an anticipated argument that appellee might make: namely, that granted a determination of the dispute on its merits was proper, the jury in the trial below had made such a determination. As is now evident, appellee has advanced no such argument. It has admitted that the issue of who was entitled to the work in question here was *never* submitted to the jury. (Appellee's Brief, p. 23.) It has thus made the application of the doctrine of primary jurisdiction unnecessary to appellants' argument that the judgment of the trial court was erroneous.

For the benefit of this Court, however, it might be well to state that appellants never asserted that the doctrine of primary jurisdiction has universal application in cases of concurrent administrative and judicial jurisdiction. As a matter of fact, other sections of the Act involved in this case provide an example, in addition to those cited in Appellee's Brief, of statutory provisions which permit a private party to sue for damages without waiting for action by the public agency charged with administering the basic statute. Section 8(b)(4)(A) of the Labor Relations Act defines the unfair labor practice of what is commonly known as the secondary boycott. Section 303(a)(1) of

the Act, taken together with Section 303(b), provides private parties with the remedy of a damage action for injuries suffered by the conduct defined in Section 8(b)(4)(A). There is no doubt in our minds that a private party could sue under Section 303(a)(1) at the same time that the Board was proceeding with unfair labor practice charges under Section 8(b)(4)(A), or even before the Board instituted proceedings under the latter section. The distinction between such a situation and the one which exists with respect to jurisdictional disputes is that nowhere in the Labor Relations Act is there a section, corresponding with Section 10(k), which is to be administered together with Sections 8(b)(4)(A) and 303(a)(1). Stated in another way, the Board has no authority whatsoever under the Labor Relations Act to find that a labor organization is entitled to carry on a secondary boycott. Under Section 10(k) of the Act, however, the Board has authority to find that a labor organization is entitled to particular work tasks. Thus, under Section 10(k), the Board is exercising a function similar to that exercised by the Interstate Commerce Commission under that body's rate-making powers. It is making a judgment requiring the specialized knowledge inherent in the administrative process. In deciding the question of who is entitled to the work, the Board is making another determination of the type referred to by this Court in *Calif. Ass'n. v. Building and Constr. Tr. Council,* 178 F. (2d) 175 (9 Cir. 1949) as one over which the Board has exclusive primary jurisdiction, subject to judicial review. (178

F. (2d) 175, 177, n. 3.) When it proceeds under Section 8(b)(4)(A), however, it is merely determining whether certain activities for proscribed objects have taken place, a determination which may be made with equal facility by courts, without violating the doctrine of primary jurisdiction.

To summarize, if appellee were arguing that the jury in the trial below had the same authority to arbitrate the question of who was entitled to the work as the Board did under Section 10(k), then the application of the doctrine of primary jurisdiction to this case would be of real moment. Since appellee agrees with us, but for different reasons, that the jury had no such authority, a detailed further consideration of the doctrine would serve no useful purpose.

We turn now to a consideration of the argument that if Congress had intended a determination of the dispute by the Board under Section 10(k) to be a condition precedent to an action for damages under Section 303(a)(4), it would have said so. It might be said, first of all, that such an argument hardly is available to appellee, who is faced with the question of why, if Congress intended Section 10(k) to be meaningless, or to mean the opposite of what it says, it passed the section with the language which it contains. The answer to the question itself, however, is that Congress did say so, albeit in a much less clear fashion than possible. Before showing this, it should be pointed out that if the language of Section 303(a)(4) were clear and unambiguous, there would be no

room for its construction, and no occasion for the references to the Congressional history which both parties on this appeal have made in their briefs.[10] Appellee has already mentioned *Printing Specialties, etc. Union v. LeBaron,* 171 F. (2d) 331 (9 Cir. 1948), the case decided by this Court which recognizes the lack of clarity in the Act's language. The point is that the language of the statute is sufficiently lacking in clarity to require construction.

The answer, then, to this argument of appellee is that the language of Section 303(a)(4) does lend support to appellants' construction. The section provides that the activities enumerated in it are not unlawful, if the "employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work". It is to be noted at once that, unlike Sections 303(a)(2) and 303(a)(3), which refer specifically to certifications of the Board under the provisions of Section 9 of the Labor Relations Act, the "order or certification" of the Board referred to in Section 303(a)(4) is not made referable to a particular provision of the Labor Relations Act. Hence, it is not unreasonable to assume that the order or certification referred to in Section 303(a)(4) includes an order or certification made by the Board under Section 10(k) of the Labor Relations Act. It should be recalled, in that connection, that the Rules and Regulations and Statements of Procedure issued

[10] *Sutherland, Statutory Construction,* 3rd Ed. (Horack), Vol. 2, Section 4702.

by the Board under Section 10(k) (see Opening Brief, pp. 38-39) refer to an issuance of "certification" by the Board after hearing under that section.[11] A certification of the labor organization which shall perform the particular work tasks in issue is the equivalent of a certification that the employees whom that organization represents are entitled to perform particular work tasks, and, in effect, a determination "of the bargaining representative for employees performing such work."

That the quoted language from Section 303(a)(4) must include an order or certification of the Board under Section 10(k) is demonstrated by the absurd results which would otherwise follow. A case we have already referred to which the Board has decided under Section 10(k) provides an excellent example. In *Winslow Bros. and Smith Co.,* 90 NLRB No. 188 (195), the Board's determination required the employer to re-assign particular work being performed by employees represented by the Teamsters Union to employees represented by the Fur and Leather Workers Union. Let us assume the employer had refused to reassign the work and thus refused to comply with the Board's determination. Let us further assume that the employees represented by the Fur and Leather

[11]Section 203.76 of the Board's Rules and Regulations applicable to Section 10(k) provides, in part:

"Upon the close of the hearing, the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, as it may determine, *to certify the labor organization* or the particular trade, craft or class of employees, as the case may be, *which shall perform the particular work tasks in issue*, or to make other disposition of the matter. * * *" (Emphasis supplied.)

Workers Union had refused to work until the employer made the reassignment. Unless the order or certification referred to in Section 303(a)(4) were construed to include one issued by the Board under Section 10(k), the employer in an action under Section 303(a)(4) could collect damages from the Fur and Leather Workers Union for a strike caused by *his* failure to comply with the Board's determination of the dispute! A construction which included a Board order under Section 10(k) within the meaning of Section 303(a)(4) would properly exempt such conduct by the Fur and Leather Workers Union from damages, since the necessary condition that the employer was not conforming would be met. In view of these considerations, it can be stated that the language of Section 303(a)(4), although ambiguous, when properly construed entirely supports the position advanced by appellants.

Only two additional misconceptions of appellee remain for reply. Appellee relies on a statement made by Senator Morse during Congressional debate in its attempted refutation of our position. (Appellee's Brief, p. 17.) It should be explained first that the remarks of Senator Morse thus quoted by appellee referred specifically to Sections 303(a)(1), (2) and (3), and not to Section 303(a)(4).[12] In any event,

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[12]This is demonstrated by the fact that Senator Morse talks about the Board being *required* to seek injunctive relief. The Board *must* seek injunctive relief only when charges under Sections 8(b)(4)(A), (B) and (C) are involved, and *may exercise its discretion* concerning whether to seek injunctive relief in instances of charges under Section 8(b)(4)(D). See Section 10(1).

they are not inconsistent with anything said by appellants. As we have already stated, nothing in the Act requires actions for damages under Sections 303 (a)(1), (2) and (3), to await Board orders under Sections 8(b)(4)(A), (B) and (C). As a matter of fact, this is equally true with respect to actions under Section 303(a)(4). Such actions can undoubtedly be brought before the Board has issued any order *under Section 8(b)(4)(D)*. And we have never made assertions to the contrary. What we have said is that neither a Board proceeding under Section 8(b)(4)(D) nor an action for damages under Section 303(a)(4) can take place *until the Board has made a determination under Section 10(k)*. Once such a determination is made, it is entirely possible for both court and Board action under the two related sections to proceed simultaneously.

This misconception of appellants' position by appellee has led to an additional one, namely, that it is our contention that the order of the Board under Section 10(k) is final. (Appellee's Brief, p. 16.) No such position was taken by appellants in their Opening Brief. Actually, under appellants' view of the statute, the Section 10(k) order of the Board, which must precede court action, would be properly reviewable by the court in an action under Section 303(a)(4). In such a review the court would be guided by the same standards that guide the courts in their review of other Board orders. These standards are given in Section 10(e) of the Labor Relations

Act, and the numerous decisions construing that section.[13]

The foregoing discussion may now be briefly summarized. It is evident that the conflict between appellants' position and that of appellee is basically whether or not the issue of which employees are entitled to particular work tasks can be decided except by the employer.[14] Appellee contends that once an employer has made an assignment of particular work, or re-assigned particular work from one group of employees to another, his decision must be accepted by all of his employees, and the labor organizations which represent them, irrespective of any consideration whatsoever other than a pre-existing certification by the Board under Section 9 of the Labor Relations Act. Once the employer has acted, says appellee, any primary concerted activities by labor organizations representing his employees in opposition to such assignment makes them answerable in damages under Section 303(a)(4). We think we have conclusively demonstrated that Congress rejected such a view in the legislation under discussion. Congress, in its desire to solve the problem of jurisdictional disputes, substituted the *resolution* of such disputes by an impartial, specially skilled agency such as the Board for

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[13]See Davis, *Scope of Review of Fed. Admin. Action*, 50 Columbia L. Rev. 559, cases collected in note 24, at 562.

[14]It has been shown that appellee virtually concedes that if the Board has authority to make such a decision, an action under Section 303(a)(4) will not lie until such decision has been made by the Board. (See supra, pp. 5-6.)

the impasse and consequent obstructions to interstate commerce created by unlimited employer power in this field. An action under Section 303(a)(4) was thus made available not for union opposition to an *employer* determination, but for such opposition to one made by the *Board*. The failure of the trial court to so construe the statute made its judgment fatally erroneous.

II.

THE COURT BELOW IS NOT A DISTRICT COURT OF THE UNITED STATES.

A. Appellee's argument does not demonstrate to the contrary.

The narrow question here presented to this Court is whether the District Court for the Territory of Alaska is a "district court of the United States" within the meaning of Section 303(b) of the Labor-Management Relations Act of 1947. It was to that narrow question that we directed attention in our Opening Brief.

Appellee confuses the issue by a generalized discussion of the differences between an "Article III" and an "Article IV" court. This leads appellee to make the assertion that a case which considered the status of the *Court of Appeals* for the *District of Columbia* for the purposes of the *Trade Commission Act*[15] is "decisive" here,[16] and permits appellee to ig-

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[15] *Federal Trade Commission v. Klesner*, 274 U.S. 145.

[16] Appellee's Brief, p. 45.

nore such cases as *In re Cooper,* 143 U.S. 742, and *Carscadden v. Territory of Alaska,* 105 F.2d 377. In both these cases the court had before it the precise question now presented—i.e., the status of the District Court in the Territory of Alaska.

To generalize the discussion the way appellee does and to avoid consideration of the cases which discuss the court in Alaska is to do a "disservice to . . . clear analysis."[17] The argument made by appellee and the cases cited by it do not bear directly upon the status of the court in Alaska. As a matter of fact, most of the cases deal with the status of the District Court for the District of Columbia.[18]

B. The cases dealing with the District Court for the District of Columbia are not "decisive" of the issue here.

The complete answer to appellee's argument, and particularly to that portion of it which is based upon *Federal Trade Commission v. Klesner, supra,* is that there is and always has been a vast difference be-

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[17]Appellee's Brief, p. 31. Incidentally, our capitalization was for emphasis only. We were and are satisfied that the decision of this Court will turn on the merits of our position and not on typographical forms employed in our brief.

[18]e.g., *O'Donoghue v. United States,* 289 U.S. 516 (Appellee's Brief, pp. 33, 35); *Federal Trade Commission v. Klesner, supra* (Appellee's Brief, pp. 45-48); *Page v. Burnstine,* 102 U.S. 664 (Appellee's Brief, pp. 38, 43, 45); see also the reliance placed by appellee for the same purpose upon other cases dealing with the District of Columbia: *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427 (Appellee's Brief, p. 32); *National Mutual Insurance Co. v. Tidewater Transfer Co.,* 337 U.S. 582 (Appellee's Brief, p. 33); *United States v. United Mine Workers,* 77 F. Supp. 563, etc. (Appellee's Brief, p. 36); and *United States v. Brotherhood of Locomotive Engineers,* 79 F. Supp. 485, etc. (Appellee's Brief, p. 36.)

tween the status of courts in the District of Columbia and those in the territories. This is made clear in *O'Donoghue v. United States, supra,* which is cited no less than five times in Appellee's Brief.[19]

In the *O'Donoghue* case the Supreme Court held that Article I, Section 3, of the Federal Constitution applied to the Supreme Court and the Courts of Appeal for the District of Columbia, and that the compensation of the judges of those courts could not lawfully be diminished during their terms of office.

The court in reaching this conclusion reviewed the early legislation and decisions dealing with the status of territorial courts commencing with *American Insurance Co. v. Canter,* 1 Pet. 511, including specifically *McAllister v. United States,* 141 U.S. 174, which, as we pointed out in our Opening Brief, dealt directly with the status of the District Court for the Territory of Alaska. After this review the court concluded that territorial courts (as distinguished from the courts in the District of Columbia) were not embraced within the purview of Article I, Section 3, of the Constitution. This was so because:

> "Since the Constitution provides for the admission by Congress of new states (Art. 4, § 3, Cl. 1), it properly may be said that the outlying continental public domain, of which the United States was the proprietor, was, from the beginning, destined for admission as a state or states into the Union; and that as a preliminary step to that foreordained end—to tide over the period of

[19]pp. 33, 35, 38, 41, 45.

> ineligibility—Congress, from time to time created territorial governments, the existence of which was necessarily limited to the period of the pupilage . . .
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> "The impermanent character of these governments has often been noted. Thus, it has been said, 'The territorial state is one of pupilage at best,' Nelson v. United States, (C.C.) 30 F. 112, 115; 'A territory, under the constitution and laws of the United States, is an inchoate state,' Ex parte Morgan (D.C.) 20 F. 298, 305. 'During the term of their pupilage as Territories they are mere dependencies of the United States.' Snow v. United States, 18 Wall. 317, 320, 21 L.ed. 784. And in Pollard v. Hagan, 3 How. 212, 224, 11 L. ed., 565, the court characterizes them as 'the temporary territorial governments.'" 289 U.S. at 537-8.

This reasoning is clearly applicable to the Territory of Alaska, and, as indicated, among the authorities considered in connection with it was at least one[20] which directly and specifically dealt with the Territory of Alaska.

Having discussed at some length the nature of territorial government, the court in the *O'Donoghue* case turned to a consideration of the status of government in the District of Columbia and commenced its discussion with the following significant sentence:

> "How different are the status and characteristics of the District of Columbia!" (*id.* at 538.)

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[20] *McAllister v. United States, supra.*

The language of Article I, Section 8, Clause 17, of the Constitution, dealing with the District of Columbia, is referred to as "words of permanent governmental power," and it is pointed out that the District of Columbia as the seat of the Government was intended to have a permanent and fixed status different from that which attached to the territories. The opinion points to considerations of a constitutional, legislative and judicial character which make it clear that there is a basic juridical difference between the status of government in the territories and that in the District of Columbia.

This distinction between the District of Columbia and the outlying territories of the United States, solidly grounded as it is in logic and history, was the basis for the decision in the *O'Donoghue* case, and it inevitably follows that nothing the Supreme Court has ever said about the status of the courts in the District of Columbia can be "decisive," or for that matter even persuasive, upon the question of the status of a territorial court.

What has been said above explains the court's decision in *Page v. Burnstine,* 102 U.S. 664, referred to by appellee at pp. 38, 43 and 45 of its brief. Even further, in that case the statute which the court was construing was one which related to the competency of witnesses in "the courts of the United States." Clearly the district court for the District of Columbia was a "court of the United States," and the narrow question here presented was not before the Supreme Court.

The only case cited by appellee in which a territorial court was held to be covered by a statute where the phrase in question was "United States District Court" is *"The Maret,"* 141 F.2d 431. In that case, however, as the footnote upon which appellee relies indicates, there was no issue raised concerning the question, and the court considered the matter of such little significance, in view of that fact, that there was no discussion of the question in its opinion, but only a passing reference to it in a footnote.

The reasoning of *"The Maret,"* as well as of the other cases cited by appellee, including *Federal Trade Commission v. Klesner,* (assuming that those cases are applicable here and ignoring their special status as cases involving courts in the District of Columbia) is substantially that the statute had to be interpreted to make the court in question a "district court of the United States," because otherwise an objective of the statute would be defeated. It is similarly argued by appellee in the case at bar that unless the court in Alaska is held to be a district court of the United States there would be no form within which a Section 303 action could be maintained in Alaska. While this argument may have had some validity in *"The Maret"* and in *Federal Trade Commission v. Klesner,* it is not meritorious here, since Section 303 specifically confers jurisdiction not only on district courts of the United States but upon "any other court" having jurisdiction of the parties, as we pointed out in our Opening Brief, p. 71.

C. A general statute vesting a territorial court with the jurisdiction of a district court of the United States does not make that court a district court.

The next major error into which appellee falls is its conception that because the law which created the Alaska court vested it "with the jurisdiction of district courts of the United States," 48 USCA 101, it therefore follows that the Alaska court is a district court of the United States. This error, first enunciated at p. 33 of Appellee's Brief, pervades its entire argument. The defect with this position is that it has repeatedly been held that the mere grant of a district court's jurisdiction to a territorial court does not make the latter a "district court of the United States."

In *United States v. Burroughs,* 289 U.S. 159, which as its citation indicates is reported in the same volume as the *O'Donoghue* case, *supra,* the Supreme Court had occasion to consider the appellate jurisdiction of the Court of Appeals of the District of Columbia. The question before it was whether the Criminal Appeals Act of 1907 which used the phrase "district courts" was applicable to the Supreme Court of the District of Columbia. It was argued, as it is here by appellee, that the District of Columbia court was such a court because by statute it was vested with the same jurisdiction as district courts of the United States. The court rejected this argument and said:

> "But vesting a court with 'the same jurisdiction as is vested in district courts' does not make it a district court of the United States. This has been repeatedly said with reference to territorial

courts. Reynolds v. United States, 98 U.S. 145; Stephens v. Cherokee Nation, 174 U.S. 476; Summers v. United States, 231 U.S. 92." 289 U.S. at 163.[21]

The court further pointed out very clearly that the Criminal Appeals Act "employs the phrase 'district courts,' not 'courts of the United States,' or 'courts exercising the same jurisdiction as district courts.' "

So here, Section 303 employs the phrase "district courts of the United States," not "courts of the United States" or "courts exercising the same jurisdiction as district courts" or any other such phrases.

Clearly, therefore, the mere fact that a territorial court is vested with the jurisdiction of a district court of the United States does not make it such a court.

D. The argument of appellee should be addressed not to this Court, but to the Congress, since this Court is not empowered to add to the statute matters which the Congress has not included therein.

Appellee relies upon the fact that Congress used five separate designations of courts throughout the different sections of the Act. From this it argues that the correct application of the definition of the phrase "district court of the United States" in Section 303(b) would result in a series of absurd and untenable situations.

In the first place, appellee is raising a false issue. This Court is not presently called upon to pass upon

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[21]See, also, the almost identical language from *Mookini v. United States*, 303 U.S. 201, 205, quoted in Opening Brief, p. 60.

any of the hypothetical situations conjured up by appellee. It is called upon only to determine whether the Alaska court is a district court of the United States within the meaning of Section 303(b). It will be time enough for this Court to consider the other problems raised by the appellee if and when litigation presenting those problems is before it.

In the second place, arguments of this character have been almost universally rejected by the courts. The argument in effect asks this Court to rewrite the statute in a manner which appellee believes would be more orderly and logical. However, it has long been settled that courts have no authority to do what Congress might have done but did not do. In our Opening Brief we noted the likelihood that this argument would be made, and we cited the cases[22] in which such contentions were rejected and in which courts held that it was not their function to engraft upon a statute additions or modifications which they thought the legislature might or should have made.

Appellee's complaint on this score (or rather the complaint of other litigants who might be damaged by virtue of any of the hypothetical situations envisaged by appellee) must be directed to the legislature, not to the courts.

Finally, appellee here is guilty of a real inconsistency. In its discussion of Point I of our Opening

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[22]*Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1;
Commissioner v. Gottlieb, 265 U.S. 310;
Kalb v. Feuerstein, 308 U.S. 433;
United States v. Cooper Corp., 312 U.S. 600.

Brief, to-wit, that a Section 10(k) determination is a jurisdictional prerequisite to a Section 303(a)(4) suit, appellee makes the point that Section 10(k) and Section 303(a)(4) are found in separate titles of the Act and deal with separate and distinct kinds of rights, and therefore the court should proceed in a Section 303(a)(4) suit as though Section 10(k) were not in the Act. At this point, however, appellee is quite content to go back to Title I and to other titles of the Act for the purpose of attempting to demonstrate that the words used in Section 303(b) do not mean what they say and what they have been for many years judicially declared to mean, but that they mean something quite different.

In concluding this phase of the discussion it must be observed that appellee has not cited a single case which holds that the District Court for the Territory of Alaska is a district court of the United States under any statute or for any purpose. On the contrary, all of the authority to which the Court's attention has been directed indicates that it is not such a court. Secondly, save for *"The Maret,"* appellee has not cited a single case in which any territorial court has been held to be a district court of the United States, and in *"The Maret"* the point was not raised and the legislation was such that unless the court so interpreted the statute there would have been no relief available; neither of these factors is present here. Thirdly, appellee's reliance upon cases dealing with the courts in the District of Columbia is rendered nugatory by the opinion in the *O'Donoghue*

case, which points out the sharp differences between the government of that District and the government of outlying territories of the United States. In substance, appellee's arguments do not meet the contention advanced by us in our Opening Brief, amply supported by authority, to the effect that the trial court was not and is not a district court of the United States.

III.

AS A RESULT OF MISCONCEIVING ITS STATUS, THE TRIAL COURT DID COMMIT SERIOUS ERROR TO THE PREJUDICE OF APPELLANTS WITH RESPECT TO ITS JURISDICTION OVER THEM AND ITS ACCEPTANCE OF FAULTY SERVICE OVER APPELLANT INTERNATIONAL.

A. As to jurisdiction.

Appellee does not state the problem correctly when it says that the question is whether or not the Alaska court would have the right to hear and decide a case in which an unincorporated association was a party.[23] The question is whether absent the provisions of Section 301 of the Act, which authorize suits against labor organizations as entities and give jurisdiction to United States district courts in the district where such organizations have their principal office or duly authorized agents engaged in representing employee members, the Alaska court had jurisdiction over the International.

Since the Alaska court was not a district court of the United States, its jurisdiction cannot be based

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[23]Appellee's Brief, p. 52.

upon the provisions of Section 301 and must be found either in the common law or in the special statutory law of Alaska. As we pointed out in our Opening Brief, it is found in neither, and the appellee does not indicate any Alaska code upon which the jurisdiction of the court could be based.

Addressing ourselves first to the narrow question of whether or not a labor organization can be sued as an entity in the Alaska court, we point out first that at common law there was no jurisdiction in any court to entertain such a suit. This is demonstrated not only by the decision in *United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, but by every collection of authorities on the subject, one of the more recent of which is referred to by appellee itself—i.e., 149 A.L.R. at 510, where it is said:

> "It is a well established rule that at common law, in the absence of an enabling or permissive statute, an unincorporated voluntary association is not capable of being sued in its common or association name, for the reason that such an association, in the absence of statutes recognizing it, has no legal entity different from that of its members."

There follows a long list of authorities from at least thirteen different jurisdictions to support this view. Whatever may be the rule in United States district courts as enunciated in the *Coronado Coal* case, *supra,* we have been cited no authority by appellee which indicates that this is the rule in the territorial court of Alaska, sitting as it does in this case as a court of general jurisdiction in the Territory of Alaska.

But irrespective of the question of whether the Alaska court has jurisdiction over any unincorporated labor organization as an entity, the question here is whether it has jurisdiction over such a labor organization *which is a non-resident of the Territory of Alaska and maintains no principal place of business there.*

At page 76 of our Opening Brief we made the categorical statement that "A thorough perusal of the three volumes of the Alaska Compiled Laws, Annotated (1948), reveals no statute of the Territory which authorizes service upon a non-resident association." That statement has not been challenged by the appellee, and this Court may take it, therefore, that there is no such statute.

In the absence of such a statute there is no basis in the Alaska law for the assumption of jurisdiction over the International, which as to Alaska was a non-resident unincorporated association. The doctrine of *Flexner v. Farson,* 248 U.S. 289, and *Doherty & Co. v. Goodman,* 294 U.S. 623, referred to at pages 74-75 of our Opening Brief, impels the conclusion that in the absence of such a statute no foreign association could be subjected to the jurisdiction of courts of the Territory of Alaska simply by service upon an agent doing business in the state. It is undoubtedly because appellee recognizes that the Alaska court did not obtain jurisdiction over the International under the common law or the Alaska statutory law, that it is compelled to argue that the trial court was a district court of the United States. If true, this

would permit the application of the provisions of Section 301 to the cause, and the assertion of jurisdiction over the International; since the trial court was not a district court of the United States, it could not properly do this, and consequently its jurisdiction must fall.

B. As to service.

The service upon Albright was not adequate to give service upon the International, and appellee's reliance upon *Sperry Products, Inc., v. Association of American Railroads,* 132 F. 2d 408, cert. den. 319 U.S. 744, is misplaced. In that case there was no question of the *jurisdiction* of the federal court, since the action was one for *patent infringement.* The only problem was one of *venue,* and the court held that the association in question was present wherever any substantial part of its activities was being carried on, and for that reason it was present in the Southern District of New York, although its headquarters were in Washington, D. C. In the case at bar it is not suggested that the International is engaged in any activities in Alaska. On the contrary, the entire controversy out of which this lawsuit arose was between appellee and Local 16. The International was in the picture only in the most peripheral manner and ultimately only because, as Albright's affidavit (T.R. 8-14) shows, the International was employing him to assist its locals. The connection of the International with Albright is certainly different from the operation of the association in the *Sperry* case.

The court in *Thermoid Co. v. United Rubber Workers of America,* 70 F. Supp. 228, 233,[24] says of the *Sperry* case.

> "Since this was a suit under the patent laws, *venue* was broader than exists in the instant case under Section 51 of the Judicial Code. For venue in patent actions must be laid 'in the district of which the defendant is an inhabitant' or 'in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." 48 Judicial Code, 28 USCA 109. (Emphasis added.)

Furthermore, as the court in *Daily Review Corp. v. Typographical Union* (E.D. N.Y.), June 30, 1950, 26 L.R.R.M. 2503, said in granting a motion to quash and set aside service of summons under Section 301 of the Act in a case where the International had no office in New York:

> "The defendant does not have an office or a representative in New York. *The defendant's local in New York is an autonomous body and defendant may not intervene or interfere in its affairs except when the local reaches an impasse on its relations with an employer,* and then only at the request of the local. When such a request is made, the defendant sends its representative to the district *merely to assist the local and the employer in arriving at an agreement."* (Emphasis added.)

This statement fairly represents the picture presented by this record with respect to the relation-

[24]Cited by appellee at pages 55-56 in its brief.

ship between the International and Local 16 and with respect to the functioning of Albright as an "International Representative." In the case at bar, as in the *Daily Review Corp.* case, *supra,* the local had reached an impasse in its relations with the employer, and the International Representative merely sought to assist the parties in reaching an agreement.

The other factors present in the *Daily Review Corp.* case are also present here—e.g., the principal office of the International is required to be in San Francisco, all of the books, records, funds, etc., are kept and maintained in San Francisco, and all of its officers reside there. Thus the "minimum contacts" concerning which appellee speaks[25] are not found on this record, and it would be a denial of due process to hold the International subject to the jurisdiction of the foreign court.

The contention that, by raising the question of lack of jurisdiction of the subject matter of the action at the same time as they raised the question of lack of jurisdiction over their person, appellants somehow defeated the operation of the foregoing rules and gave the Alaska court a jurisdiction which it did not have is not sound. Apart from the fact that it makes the determination of fundamental questions turn upon highly technical considerations, it is contrary to the well established rule that a jurisdictional defect is not cured by a general appearance and that, as a matter of fact, a jurisdictional defect is never cured and can be raised by the court on its own mo-

[25]Appellee's Brief, p. 57.

tion. This rule has been enunciated in cases dealing with unincorporated labor organizations as parties defendant over whom it was sought improperly to obtain jurisdiction.

Grant v. Carpenters District Council, 322 Pa. 62, 185 Atlantic 373.

Mitch v. United Mine Workers, 87 W.Va. 119, 104 S.E. 292.

And see cases cited at 149 A.L.R. 517.

CONCLUSION.

We do not feel that a useful purpose would be served by giving detailed consideration to those of appellee's points other than the ones to which we have replied here. Our reply has demonstrated that our contentions with respect to the trial court's misconceptions of the nature of the cause of action, and of its status as a court, are unanswerable. Accordingly, the judgment below should be reversed.

Dated, San Francisco, California,
November 15, 1950.

Respectfully submitted,
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